

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

AT RICHMOND, JUNE 1, 2004

COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION

CASE NO. INS-2002-01318

Ex Parte: In the matter of  
Adopting Rules Governing Claims-  
Made Liability Insurance Policies

ORDER ADOPTING RULES

By order entered herein January 6, 2003, all interested persons were ordered to take notice that the Commission would consider the entry of an order subsequent to February 27, 2003, adopting rules proposed by the Bureau of Insurance entitled Rules Governing Claims-Made Liability Insurance Policies, to be designated as Chapter 335 of Title 14 of the Virginia Administrative Code, unless on or before February 27, 2003, any person objecting to the adoption of the proposed rules filed a request for a hearing with the Clerk of the Commission.

The Order to Take Notice also required all interested persons to file their comments in support of or in opposition to the proposed rules on or before February 27, 2003.

The National Association of Professional Surplus Lines Offices, Ltd., filed comments with the Clerk on February 19, 2003. The National Association of Independent Insurers and the American Insurance Association filed comments and requests for a hearing with the Clerk on February 27, 2003; however, both associations subsequently withdrew their hearing requests. The law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP filed comments with the Clerk on March 3, 2003. Chubb & Son filed comments with the Clerk on March 4, 2003.

The filed comments were extensive and, when viewed as a whole, recommended comprehensive revisions to the proposed rules. Among the primary objections raised by the

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interested persons were the following: (i) insurers must offer an unlimited extension of time to report claims (ii) insurers may not charge more than 200% of the expiring policy's premium for the extended reporting period unless filed in accordance with the delayed effect provisions set forth in § 38.2-1912 of the Code of Virginia (iii) for most claims-made liability insurance policies, insurers must offer an extended reporting period that includes unimpaired limits of liability equal to the limits of the policy being extended; and (iv) the offer of an extended reporting period by an insurer providing excess or umbrella liability coverage may not be contingent upon the continuation of the underlying policy or the purchase of an extended reporting period for the underlying policy. The overall concern expressed by a majority of the interested persons was that such requirements would adversely affect the affordability and availability of claims-made liability insurance policies delivered or issued for delivery in Virginia.

The Bureau reviewed the filed comments and, in response, made the following revisions to the proposed rules: (i) insurers must offer an unlimited extension of time to report claims for medical professional liability insurance policies only; for all other claims-made liability insurance policies, a two-year extended reporting period must be offered (ii) insurers may charge more than 200% of the expiring policy's premium for the extended reporting period without being subject to § 38.2-1912; and (iii) insurers are not required to offer an extended reporting period on excess or umbrella liability policies if the underlying policy is not continued or the extended reporting period on the underlying policy is not purchased.

In addition to the revisions made in response to the filed comments, the Bureau also made the following substantive revisions to the proposed rules: (i) insurers must provide a notice advising insureds that claims-made coverage has been purchased and that there are certain

circumstances when an extended reporting period must be offered; and (ii) to the extent that policy limits apply separately to each named insured, each named insured is separately entitled to purchase an extended reporting period.

Furthermore, as set forth in its Statement of Position filed with the Clerk on June 1, 2004, the Bureau recommends that the provision requiring insurers to offer unimpaired limits of liability should remain in the rules. The Bureau also provides an explanation for why it recommends that the proposed rules be revised to require the offer of an unlimited extended reporting period for medical professional liability insurance policies and the offer of a two-year extended reporting period for all other claims-made liability insurance policies.

THE COMMISSION, having considered the proposed rules, the filed comments, and the Bureau's response and recommendations, is of the opinion that the attached rules, which reflect the Bureau's recommendations, should be adopted.

THEREFORE, IT IS ORDERED THAT:

(1) The Rules Governing Claims-Made Liability Insurance Policies, which are attached hereto and made a part hereof, should be, and they are hereby, ADOPTED to be effective January 1, 2005;

(2) AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to the Bureau of Insurance in care of Deputy Commissioner Mary M. Bannister, who forthwith shall give further notice of the adoption of the rules by mailing a copy of this Order, together with a copy of the rules, to all insurers licensed by the Commission to write liability insurance, other than automobile liability insurance, in the Commonwealth of Virginia, and certain interested parties designated by the Bureau of Insurance.

(3) The Commission's Division of Information Resources forthwith shall cause a copy of this Order, including a copy of the attached rules, to be forwarded to the Virginia Registrar of Regulations for appropriate publication in the Virginia Register of Regulations and shall make this Order and the attached rules available on the Commission's website, <http://www.state.va.us/scc/caseinfo.htm>.

(4) The Bureau of Insurance shall file with the Clerk of the Commission an affidavit of compliance with the notice requirements of paragraph (2) above.

CHAPTER 335.

RULES GOVERNING CLAIMS-MADE LIABILITY INSURANCE POLICIES.

14 VAC 5-335-10. Scope.

The provisions of this chapter shall apply to all policies of liability insurance, as defined in §§ 38.2-117[and ], 38.2-118 [, and subsection B of § 38.2-111] of the Code of Virginia, that limit the time allowed for reporting claims arising out of injury [or ], damage [, or wrongful act or omission] covered by the policy. Any such policy shall be deemed to be a claims-made liability insurance policy for purposes of this chapter. The provisions of this chapter shall apply to all claims-made liability insurance policies delivered or issued for delivery in this Commonwealth to become effective on or after [May 1, 2003 January 1, 2005].

14 VAC 5-335-20. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Claims-made liability insurance policy" means an insurance policy or endorsement providing coverage for the insured's liability for injury [or ], damage [, or wrongful act or omission] occurring prior to the termination of coverage but subsequent to any [applicable] retroactive date, provided the claim for such injury [or ], damage [, or wrongful act or omission] is first made during the policy period or any extended reporting period.

"Extended reporting [~~coverage~~ period]" means an extension of the time allowed for reporting claims, after termination of claims-made liability coverage, for injury [~~or~~ ,] damage [, or wrongful act or omission] that occurred prior to termination of the coverage and that, except for the requirement to report claims during the policy period, was otherwise covered by the policy.

"Retroactive date" means the date on or after which injury [~~or~~ ,] damage [, or wrongful act or omission] may occur and be covered under a claims-made liability [insurance] policy.

14 VAC 5-335-30. Insurers to offer extended reporting [period] coverage.

A. [~~Any insurer that issues or delivers a~~ Every] claims-made liability insurance policy [issued or delivered] in this Commonwealth shall [~~offer~~ include a provision which shall offer] to [~~each the~~] named insured extended reporting [period] coverage[.]

1. The extended reporting coverage shall be offered, in writing, to all named insureds-] upon termination of claims-made coverage. [To the extent that policy limits apply separately to each named insured, each named insured shall be separately entitled to purchase an extended reporting period.] Termination of claims-made coverage shall include:

[a 1.] Cancellation or nonrenewal of the policy by the insurer or the insured;

[b 2.] Advancement of any [applicable] retroactive date; or

[c 3.] Renewal of the coverage on other than a claims-made basis.

[2B.] The insured shall be allowed at least 30 days after termination in which to purchase the extended reporting [period] coverage.

[BC.] Notwithstanding the foregoing, extended reporting [period] coverage does not have to be offered if cancellation or nonrenewal of a claims-made [liability insurance] policy is due to:

1. Nonpayment of premium; [or]
2. Failure to comply with terms or conditions of the policy [ ; or]
3. Fraud ].

[CD.] No insurer shall deliver or issue for delivery a claims-made liability insurance policy in this Commonwealth unless such policy contains the provisions set forth in [subsections A through C of ] this section.

[E. The following notice, or a notice that is substantially similar, shall be provided, in writing, with each new and renewal claims-made liability insurance policy issued or delivered in this Commonwealth:

You have purchased a claims-made liability insurance policy. Please read this policy carefully to understand your coverage. There are certain circumstances in which you must be provided the opportunity to purchase an extended reporting period for reporting claims. These are explained in your policy. If you have any questions regarding the cost of an extended reporting period or the available options under the extended reporting period, please contact your insurance company or your insurance agent.]

14 VAC 5-335-40. Extended reporting [~~coverage period~~] requirements.

A. Each insurer shall offer an [~~unlimited~~] extension of the time allowed to report claims [~~subject to any applicable statute of limitations~~] as follows:

1. For medical professional liability insurance, an unlimited extended reporting period shall be offered;

2. For all other claims-made liability insurance policies, a two-year extended reporting period shall be offered].

However, this shall not prohibit the insurer from also offering [~~other, greater or~~] more limited [~~,-~~] extensions of time in which to report claims. [~~The premium charge for extended reporting coverage shall not exceed 200% of the premium for the expiring policy unless such additional premium charge is filed with the commission in compliance with the delayed effect filing provisions of § 38.2 1912 of the Code of Virginia as if competition is not an effective regulator of rates.~~] No insurer shall deliver or issue for delivery a claims-made liability insurance policy in this Commonwealth unless such policy contains the [~~applicable~~] provisions set forth in this subsection.

B. Each insurer shall offer an extended reporting period that includes unimpaired limits of liability equal to the limits of the policy being extended. However, this shall not prohibit the insurer from also offering higher or lower limits of liability applicable to the extended reporting period. No insurer shall deliver or issue for delivery a claims-made liability insurance policy in this Commonwealth unless such policy contains the [~~applicable~~] provisions set forth in this subsection. This subsection shall not apply to excess or umbrella liability coverage, or environmental impairment or pollution liability



coverage, or to a limited extended reporting period of 60 days or less provided automatically without an additional premium charge [; nor shall this subsection apply to any class, line, subclassification, or market segment exempted from this requirement by order of the commission].

C. When an insurer excludes any existing coverage from a claims-made liability insurance policy and the policy remains in effect or is renewed, the insurer shall offer an extended reporting period for such coverage on the same basis that the extended reporting period would be offered if the entire policy were being terminated. [For purposes of this subsection, the exclusion of any existing coverage shall not include changes in policy limits or deductibles.]

14 VAC 5-335-50. Prohibitions.

A. Once purchased by the insured, extended reporting [period] coverage shall not be cancelled by the insurer except for nonpayment of premium [or fraud]. No extended reporting endorsement shall be delivered or issued for delivery in this Commonwealth unless it contains this provision.

~~[B. The offer of extended reporting coverage by an insurer providing excess or umbrella liability coverage shall not be contingent upon:~~

~~1. The continuation of the underlying liability insurance coverage;~~

~~2. The purchase of extended reporting coverage for the underlying liability insurance policy; or~~

~~3. The type of extended reporting coverage purchased for the underlying liability insurance policy.~~

€ B]. Except with respect to a limited extended reporting period of 60 days or less provided automatically without an additional premium charge, an insurer shall be prohibited from voiding extended reporting [period] coverage on the basis that other applicable insurance coverage is in effect. However, this shall not prohibit an insurer from applying the extended reporting [period] coverage as excess over such other insurance.

14 VAC 5-335-60. Severability.

If any provision of this chapter or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.